Renuka a/p Muniandy @ Ramakrishnan v Jeeva a/l Kalia Perumal

HIGH COURT (PENANG) — DIVORCE PETITION NO 33–253–08 OF 2014
ABDUL WAHAB MOHAMED JC
31 JANUARY 2017

Family Law — Divorce — Irretrievable breakdown of marriage — Marriage dissolved on mutual admission of parties that marriage had irretrievably broken down — Court not required to make finding as to cause of breakdown of marriage absent any claim under s 78 of the Law Reform (Marriage And Divorce) Act 1976 — Whether court only concerned with division of matrimonial assets and provisions for welfare of children including access

The petitioner, a 45-year-old government school teacher, filed for divorce from her 50-year-old husband, the respondent, on the ground the marriage that had lasted for 20 years had irretrievably broken down. In her divorce petition, the petitioner alleged that after suffering years of physical and emotional abuse from the respondent, she and her children could no longer live with him. The couple co-owned a matrimonial home and two shophouses and had four children whose ages ranged from 7–18 years. The petitioner did not claim for maintenance for herself but sought maintenance for her children. She also sought, inter alia, orders that: (a) the respondent be given only reasonable and/or supervised access to the children (not amounting to overnight access) subject to the children's wishes; (b) she be given full ownership of the matrimonial home; (c) the two shophouses be sold and the proceeds of sale be held by her on trust for the children's education; and (d) half of the respondent's EPF savings be given to her to hold on trust for the children in equal shares. The respondent conceded that the marriage had irretrievably broken down and did not challenge the petitioner's claim for custody of the children but sought liberal access to them whether personally or by way of telephone. Inter alia, the respondent asked the court to order that each party be given ownership of one of the shophouses and not to make any division on his EPF savings as he would require the funds for his medical and health needs.

Held:

(1) The matrimonial home (currently under a government housing loan) be divided in the proportion of 40% share each to the petitioner and the respondent and the remaining 20% share to be held by the petitioner on trust for the children. As the petitioner intended for herself and her children to stay in the matrimonial home, the petitioner was to pay the

respondent within 12 months his 40% share in the property in cash (less the redemption sum payable on the property and other incidental costs) on the basis of a valuation report showing the current market value of the property. If the petitioner failed to make the payment within the stipulated time, she was required to sell the property and divide the net proceeds of sale according to the share allocation as ordered by the court (see paras 54–56).

(2) Each party do immediately transfer to the other, his/her half undivided share in the two shophouses such that the respondent became full owner of the shophouse at Taman Kota Kenari, Kulim, Kedah whilst the petitioner became full owner of the shop-house at Taman Seri Mahkota, Kedah; the petitioner to hold the respondent's half undivided share in the Taman Seri Mahkota shop-house on trust for the children until they attained the age of 18 years. If the petitioner sold the shop-house, the proceeds from the portion held on trust shall be set aside for the children's educational and other needs (see para 57(a)–(b)).

(3) The respondent do give 25% of his EPF monies to the petitioner to be held on trust for the children (see para 57(d)).

(4) The respondent do pay the petitioner RM2,750 per month for maintenance of the children until the completion of their tertiary education. In addition, the respondent was to pay arrears of maintenance for the children at the rate of RM500 per month per child from the date of the filing of the divorce petition until the date of grant of the decree nisi (see para 57(e)–(f)).

(5) The respondent be allowed supervised access to the children, subject to the wishes of the children, in the following manner: if the respondent was working overseas, that he be given supervised access for three hours on a Saturday whenever he was back in Malaysia; if the respondent was working in Malaysia, that he be given supervised access on alternate Saturdays for three hours (see paras 57(g)(i)–(ii) & 58).

(6) As the parties had mutually agreed that the marriage had broken down irretrievably and there was no claim by the petitioner for her own maintenance under s 78 of the Law Reform (Marriage And Divorce) Act 1976, there was no need for the court to make a finding as to the cause of the breakdown of the marriage (see para 19).

[Bahasa Malaysia summary

Pempetisyen, seorang guru sekolah kerajaan yang berumur 45 tahun memfailkan cerai terhadap suaminya yang berumur 50 tahun, iaitu responden atas alasan perkahwinan tersebut yang berlangsung selama 20 tahun tidak dapat diselamatkan lagi. Dalam petisyen penceraiannya, petisyen mendakwa merana didera secara fizikal dan emosi oleh responden bertahun-tahun

lamanya dan dia dan anak-anaknya tidak lagi boleh tinggal bersama-sama responden. Pasangan tersebut memiliki bersama sebuah rumah kelamin dan dua rumah kedai dan anak-anak mereka berumur antara 7–18 tahun. Petisyen tidak menuntut nafkah bagi dirinya sebaliknya menuntut nafkah bagi anak-anaknya. Dia juga memohon, antara lain, perintah agar: (a) responden diberi akses terhadap anak-anak mereka secara munasabah dan/atau bawah penyeliaan (tidak sampai akses untuk bermalam) tertakluk pada keinginan anak-anak; (b) agar dia diberi milikan penuh terhadap rumah kelamin; (c) agar rumah kedai dijual dan hasil jualan dipegang olehnya sebagai amanah bagi pendidikan anak-anak; dan (d) setengah simpanan EPF responden diberi kepada pempetisyen untuk dipegang sama rata sebagai amanah bagi anak-anaknya. Responden bersetuju bahawa perkahwinan mereka tidak dapat diselamatkan tetapi tidak mencabar tuntutan pempetisyen bagi jagaan anak-anak tetapi memohon akses bebas terhadap mereka sama ada secara peribadi atau melalui telefon. Antara lain, responden memohon kepada mahkamah untuk memerintahkan agar pihak-pihak diberi milikan rumah kedai dan agar tidak membuat pembahagian simpanan EPF kerana dia memerlukan dana tersebut untuk keperluan kesihatan dan perubatannya.

Diputuskan:

(1) Rumah kelamin (bawah pinjaman perumahan kerajaan) dibahagikan dengan pembahagian 40% masing-masing pempetisyen dan responden dan baki 20% dipegang oleh pempetisyen sebagai amanah bagi anak-anak mereka. Memandangkan pempetisyen berniat untuk tinggal dalam rumah kelamin bersama-anak-anaknya, pempetisyen perlu membayar kepada responden dalam masa 12 bulan bahagian 40% secara tunai (kurang daripada jumlah tidak boleh diselamatkan yang perlu dibayar terhadap hartanah dan lain-lain kos insiden) berdasarkan laporan penilaian yang menunjukkan nilai pasaran semasa hartanah. Sekiranya pempetisyen gagal membuat bayaran dalam masa yang ditetapkan, dia perlu menjual hartanah tersebut dan membahagikan keuntungan jualan berdasarkan pembahagian yang diperintahkan oleh mahkamah (lihat perenggan 54–56).

(2) Setiap pihak memindah milik kepada pihak satu lagi bahagiannya yang tidak dibahagikan dalam rumah kedai, menjadikan responden pemilik penuh rumah kedai di Taman Kenari, Kulim, Kedah manakala pempetisyen menjadi pemilik penuh rumah kedai di Taman Seri Mahkota sebagai amanah bagi anak-anak hingga mereka mencapai umur 18 tahun. Jika pempetisyen menjual rumah kedai tersebut, hasil daripada bahagian yang dipegang sebagai amanah akan diketepikan bagi tujuan pendidikan anak-anak dan keperluan-keperluan lain (lihat perenggan 57(a)–(b)).

(3) Responden memberi 25% simpanan EPFnya kepada pempetisyen untuk

dipegang sebagai amanah buat anak-anaknya (lihat perenggan 57(d)).

(4) Responden membayar kepada pempetisyen RM2,750 setiap bulan bagi nafkah anak-anaknya hingga mereka tamat pendidikan tertisiari. Tambahan lagi, responden perlu membayar tunggakan nafkah anak-anak pada kadar RM500 sebulan setiap seorang anak dari tarikh pemfailan petisyen penceraian hingga tarikh pemberian decree nisi (lihat perenggan 57(e)–(f)).

(5) Responden dibenarkan akses berselia anak-anak, tertakluk pada kehendak anak-anak, dalam susunan berikut: jika responden bekerja luar negara, dia diberi akses yang diselia selama tiga jam pada hari Sabtu apabila dia ada di Malaysia; jika responden bekerja di Malaysia, dia diberi akses yang diselia setiap Sabtu berselang selama tiga jam (lihat perenggan 57(g)(i)–(ii) & 58).

(6) Memandangkan pihak-pihak sama-sama bersetuju bahawa perkahwinan tidak boleh diselamatkan lagi dan tiada tuntutan oleh pempetisyen bagi nafkahnya bawah s 78 Akta Membaharui Undang-Undang (Perkahwinan dan Penceraian) 1976, tiada keperluan untuk mahkamah membuat dapatan bagi penceraian rumah tangga (lihat perenggan 19).]

Notes

For cases on irretrievable breakdown of marriage, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4294–4295.

Cases referred to

Baheerathy a/p Arumugam v V Gunaselan a/l V Visvanathan [2012] 6 MLJ 868; [2013] 1 CLJ 954; [2012] 5 AMR 771, HC (refd)

Ching Seng Woah v Lim Shook Lin [1997] 1 MLJ 109; [1997] 1 CLJ 375, CA (refd)

James Jemut Masing v Fiona Frances Masing Nee Henderson [1994] MLJU 531; [1994] 2 CLJ 390, HC (refd)

K Shanta Kumari v Vijayan [1986] 2 MLJ 216; [1985] 1 LNS 135 (refd)

Leong Sam Moy v Low Chee Thiam [1996] MLJU 640; [1997] 2 CLJ Supp 212, HC (folld)

Lim Bee Cheng v Christopher Lee Joo Peng [1997] 4 MLJ 35; [1996] 2 CLJ 697, HC (refd)

Lim Kuen Kuen v Hiew Kim Fook & Anor [1994] 2 MLJ 693; [1994] 3 CLJ 471, HC (refd)

Mahabir Prasad v Mahabir Prasad [1982] 1 MLJ 189, FC (refd)

Ng Say Chuan (h) v Lim Szu Ling (w) and another application [2010] 4 MLJ 796; [2010] 10 CLJ 371, HC (refd)

SS v HJK [1991] MLJU 18; [1991] 1 LNS 99; [1992] AMR 145, HC (refd)

Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah [2000] 6 MLJ 48; [2000] 3 CLJ 175, HC (refd)

A *Tay Chuen Siang v Wang, Chiao-Wen (f)* [2009] MLJU 260; [2009] 9 CLJ 84, HC (refd)
Wong Kim Foong (f) v Teau Ah Kau @ Chong Kwong Fatt [1998] 1 MLJ 359; [1998] 1 CLJ 358, HC (refd)

B **Legislation referred to**

Law Reform (Marriage And Divorce) Act 1976 ss 54, 76, 76(2)(c), 78, 88(1), (2), 92, 93, 95
Penal Code ss 323, 427

C *RSN Rayer (R Nethaji Rayer & Co) for the petitioner.*
Lalitha Menon (Lalitha Menon & Assoc) for the respondent.

Abdul Wahab Mohamed JC:

D INTRODUCTION

[1] This is a divorce petition filed by the wife petitioner Renuka a/p Muniandy @ Ramakrushnan ('the petitioner') against the husband respondent Jeeva a/l Perumal ('the respondent').

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BACKGROUND FACTS

[2] The petitioner aged 45 and the respondent aged 50 have been married since 16 February 1997 and had four children namely:

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(a) Jayhanraaj a/l Jeeva — a son born on 19 September 1998, now aged 18 years;

(b) Rajeev a/l Jeeva — a son born on 7 May 2001, now aged 15 years;

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(c) Jayavarman a/l Jeeva — a son born on 5 March 2008, now aged eight years; and

(d) Jayshree a/p Jeeva — a daughter born on 23 March 2009, now aged seven years.

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[3] The petitioner is a teacher earning a gross income of RM6,069.86 while the respondent works as a general manager of an oil palm estate in East Kalimantan Indonesia. The respondent presently earns an income of approximately RM15,000. The petitioner and the respondent are co-owners of the following properties:

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(a) No 354, Jalan Kota Kenari 4, Taman Kota Kenari, 09000, Kulim Kedah (mortgage loan still being paid) ('matrimonial home');

(b) No 473, Jalan Kota Kenai 3, Taman Kota Kenari, 09000, Kulim Kedah (mortgage loans fully paid) ('shophouse 1'); and

(c) No 127, Lorong Mahkota 8/1 Taman Seri Mahkota Kedah (mortgage loans fully paid) ('shophouse 2'). A

[4] The petitioner alleged as follows:

(a) in 2003, the respondent and petitioner shifted to Labu, Seremban where even there, the respondent repeated his acts of violence towards the petitioner. At that time, the petitioner was a secondary school teacher at SMK Dato Mohd Said, Nilai. At times, if the petitioner was a little late, the respondent would come to the government school where the petitioner was teaching in and create a ruckus and commotion and thereafter assault the petitioner when the petitioner returns home. The respondent then started treating the petitioner with suspicion whenever the petitioner attended meetings at school. The respondent started doubting if the petitioner really attended her school meeting or otherwise; B C D

(b) in the year 2005, the respondent got a job in Sumatra, Indonesia whilst the petitioner got a transfer to a government school in Kulim and the petitioner resided with the children in the said matrimonial home. The respondent comes back every three months and continued to treat the petitioner with grave suspicion accusing the petitioner of having an affair with other men. His act of physical violence and emotional torture continued every time he comes back to visit the petitioner. The petitioner did not lodge a police report against the respondent due to fear of being further physically abused by him and his further reactions if a police report were to be lodged against him; E F

(c) on 29 July 2007, upon returning home after school, the respondent was drunk and he started physically assaulting and hurting the petitioner. The respondent threatened to kill the petitioner if she refused to leave the house and the respondent then chased the petitioner out of the matrimonial home. The respondent further challenged the petitioner to lodge a police report on the said incident and that was when the petitioner lodged the first report ever since suffering physical and emotional abuses since 1998; G

(d) on 17 October 2009, the petitioner returned to the matrimonial home late from her parent's house and the respondent was already in a drunken state. The respondent had took out a pair of scissors and chased the petitioner. The respondent then started injuring himself with the scissors, took the blood and rubbed it on the petitioner's forehead. The petitioner immediately carried her third son and rushed out of the said house. The petitioner further alleged that the respondent had chased them and caught hold of them and he had threw the third son who was then an infant to the grass in the compound and the respondent grabbed the petitioner by her neck and started chocking and strangulating her. H I

A The petitioner had lodged a police report on the next day. Thereafter, the petitioner sought refuge in her parent's house;

(e) on 20 October 2009 the respondent came to her parent's house and started shouting. He then forcefully took the petitioner's maid without the petitioner consent and sent her to his brother's house;

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(f) on 30 October 2009, the respondent had harassed the petitioner's babysitter and warned her to stop caring for the said children of the marriage and it was further alleged by the petitioner that the respondent had threatened to send spies to see if the petitioner's babysitter cared for

C the said children. The respondent even got his cousin brother involved in the harassment. It was submitted by the petitioner on this allegation that it was the respondent's bad intention to deprive the said children of the marriage from the petitioner's maid's care and the petitioner's babysitter's care in order to cause the petitioner further difficulties as the

D petitioner was working as a government school teacher and will not be at home during work hours to care for the said children of the marriage;

(g) on 26 November 2009, some unidentified persons set the petitioner father's car and the petitioner's car on fire. The petitioner believed that

E these persons were men hired by the respondent to further harass the petitioner;

(h) the respondent made suicidal threats of taking poison and then later made promises to the petitioner's parents to get back together with the petitioner. However each time the respondent comes back from

F Indonesia, he continued to harass and assault the petitioner physically and emotionally too. The respondent further damaged and broke the petitioner's handphones and laptops;

(i) the petitioner's PhD books and materials were also torn by the

G respondent in his effort to prevent the petitioner from furthering her doctorate studies, which the petitioner was pursuing in Universiti Sains Malaysia. The respondent had even called the petitioner's university lecturer and told them not to give her the opportunity to represent the University to Netherlands for an environmental conference, which the

H petitioner was selected for;

(j) on 3 March 2012, the respondent physically abused the second child and the said child ran out of the said house. The respondent further threw his school bag and books out in order to burn it. The petitioner called up the police and went to lodge a report on the incident. The

I respondent then left the said house and then returned in a drunken state. The respondent then threatened to kill the petitioner and her family. The petitioner rushed to her parent's house and contacted the child and she was told that the respondent was still waiting in front of the said house with a hammer and 'parang'. The petitioner had to thereafter seek

the security of her siblings to accompany her to the said house. When the petitioner's brothers accompanied her to the said house, the respondent pushed her eldest brother (Mr Thamotharan a/l Ramakrishnan) and took the 'parang' to assault him. This was witnessed by the petitioner's third brother (Mr Tinagaran a/l Ramakrishnan) and her uncle (Mr Krishnan a/l Ramasamy);

(k) on 10 April 2012, the petitioner finally obtained an interim protection order from the Kulim Magistrate Court against the respondent. Upon obtaining the IPO, the respondent then tried coming back and started talking to the children. The respondent contacted the petitioner as well. Wanting to give the respondent an opportunity and for the sake of the children's interest, whenever the respondent comes back, the children and the petitioner will go back to the said house, clean it up and then fetch the respondent from the airport. The petitioner and the said children would stay with the respondent until he returns for work. Though the respondent had his dissatisfactions, there were no major violence except arguments and occasional hitting of the said children of the marriage;

(l) on 18 November 2013, the respondent was sacked from his job due to misbehavior associated to his extreme alcoholism. The petitioner was informed of this fact by the respondent's general manager. Upon the respondent's return, the petitioner tried her level best to get him a job. The petitioner even took the respondent for interview in Kuala Lumpur. In addition, the petitioner encouraged and took the respondent for meditation classes in order to improve his condition;

(m) on 21 December 2013, the respondent came back to the said house drunk and tried to push and physically assault the petitioner. The petitioner told the respondent that she is going back to her parent's house. The respondent proceeded to lock the house gate to confine the petitioner from leaving. The respondent then tried puncturing the petitioner's car tyres in order to prevent the petitioner from seeking refuge at her parent's house. The petitioner tried to prevent the respondent and as a result the respondent carried the petitioner and bashed her down at the porch. This was witnessed by the other two children, namely Jayavarman a/l Jeeva and Jayshree a/p Jeeva. The respondent then drove off with his car;

(n) in pain the petitioner went to her babysitter's house and sought help to get to the hospital. The petitioner was hospitalised for three days due to pelvic tissue injury. The respondent came to the hospital and offered RM500 to settle the bills. He claimed he was too drunk and was unaware of what he did to the petitioner. Thereafter, the petitioner stayed in her parent's house and would only occasionally go back to the said house to maintain it in the respondent's absence;

(o) on 14 January 2014, the petitioner went to the said house to celebrate 'Ponggal festivity'. The petitioner called the respondent and he said he was with some friends. Around 7pm, the respondent came near by car to the said house and upon seeing the petitioner and the said children of the marriage, he quickly left the scene;

(p) on 15 January 2014, the respondent kept calling and asking the petitioner for her jewelries but she refused to accede to his demands. But in fear, the petitioner gave him a bank account book of the third and fourth child which had savings amounting to RM8,000 in total. The respondent withdrew the money. The petitioner then asked RM2,000 off the RM8,000 from the respondent in order to pay for the road tax and insurance of the car. She told the respondent that she had to go for her classes at University Sains Malaysia and she asked him to bank in the money. The respondent insisted that he wanted to come to the petitioner parents' house and pass the money. The petitioner had to refuse this due to his violent tendencies at her parents' house and the respondent failed to bank in the money that was withdrawn;

(q) on 16 January 2014, the respondent called the petitioner parent's house phone and asked for the petitioner. She was bathing at that time and her maid told him so. The respondent spoke to the youngest daughter and then due to some misunderstanding, the respondent started shouting over the phone. The respondent misunderstood that the youngest daughter had been told by the maid not to speak to the respondent. The respondent continued using profane, abusive and intimidating languages over the phone despite the eldest child and the petitioner explaining the misunderstanding. The heated conversation was recorded on the respondent's handphone. The respondent had threatened to come over and bang the house gate. He threatened to put the petitioner's maid in jail for allegedly telling the petitioner's youngest daughter not to speak to him. The respondent further challenged the petitioner to call her brothers to the scene;

(r) the respondent then arrived at the petitioner's parent's house and started carrying huge stones and throwing it into the house. The respondent threw a large stone and broke her car windscreen. The respondent then climbed over the gate and barged into the house. He damaged the grill and then assaulted the petitioner. The petitioner was injured in her hands. The eldest son was punched when he came to protect the petitioner from being physically assaulted by the respondent. The petitioner ran out of the house and sought her neighbors help. The respondent damaged all the vases and pots in her parent's house and then proceeded to come out looking for her. The respondent then damaged her brother's car and her car too. The respondent was unaware that his

mobile phone had fallen of his pocket during his violent rampage and the petitioner has obtained the relevant call recordings of the threats he made;

(s) the respondent then began verbally abusing the petitioner at the roadside and accused her of having an affair with her neighbor's husband in the open when she went to seek help. By then the police were called in and a group of policemen arrested him and took him away. The respondent was taken to the Kulim Hi-Tech Police Station lock-up and when the petitioner arrived to lodge a report against him, the respondent kept pleading to the petitioner to withdraw the report and in return he said he will give her divorce;

(t) due to his frequent interruptions in the Kulim Hi-Tech Police Station lock-up, the police then advised the petitioner to go to the Ibu Pejabat Daerah (IPD) Kulim Police Station to lodge the report. The police then went to her parent's house to take photographs of the incident and collect evidence. The petitioner then went to Hospital Kulim for treatment;

(u) on 26 January 2014, the petitioner met Sjn Aziz bin A Rahman from IPD Kulim, the officer investigating the incident that happened on 16 January 2014 and he issued a letter for the petitioner to obtain a fresh interim protection order against the respondent. The respondent was charged in the Kulim Magistrates Court on 21 January 2014 under ss 323 and 427 of the Penal Code and he was convicted and fined. The petitioner verily believes that for the safety of the children and the petitioner, they should be separated and protected from the respondent who now has a criminal conviction record; and

(v) knowing that the process of the mandatory counseling sessions will take time, in the interim, the petitioner instructed her solicitors to immediately secure her rights to the custody, care and control of the said children of the marriage and she also sought protection from being further harmed physically and emotionally by the respondent which led to the filing of the Originating Summons No 24F-3–01 of 2014.

THE PETITIONER'S SUBMISSION

[5] The petitioner's case is that the marriage has broken down irretrievably and the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent (s 54 of the Law Reform (Marriage And Divorce) Act 1976). The petitioner has further stated that the respondent has behaved in such a way that the petitioner and the children of the marriage find it intolerable to live with the respondent. The petitioner applied for the following orders:

(a) that the said marriage be dissolved;

(b) that the petitioner be given guardianship, full custody, control and care of Jayhanraaj a/l Jeeva, Rajeev a/l Jeeva, Jayavarman a/l Jeeva and Jayshree a/p Jeeva (seven years old) ('the said children');

(c) that the respondent be given reasonable and/or supervised access not amounting to overnight access subject to the said children being interviewed by the learned judge;

(d) that the respondent pays the petitioner a monthly sum of RM1,000 at the beginning of each month, as maintenance for each child until each child reaches the age of majority;

(e) that the respondent pay all arrears of maintenance ordered by the High Court vide interim court order dated 1 April 2014 within one month from the date of the order;

(f) that the respondent's EPF savings be declared as a matrimonial asset and the respondent be ordered to give 50% of his EPF savings to the petitioner to hold it on trust for the said children of the marriage in equal shares;

(g) that the respondent transfers his 1/2 share of the matrimonial home bearing address of No 354, Jalan Kota Kenari 4, Taman Kota Kenari, 09000 Kulim, Kedah now held in joint names to the petitioner within 14 days from the date of the order and the petitioner be declared as the sole legal owner of the matrimonial home;

(h) that in the event the respondent fails and/or refuses to sign/execute the documents pertaining to the transfer of the respondent's 1/2 share of the matrimonial home to the petitioner within 14 days from the date of being required and ordered to do so; then the Penolong Kanan Pendaftar of the High Court at Penang be empowered to sign/execute the said documents on the respondent's behalf;

(i) that the respondent by himself, servant, agent, relative or members of his family be disallowed from entering the matrimonial home occupied by the respondent and the children at No 354, Jalan Kota Kenari 4, Taman Kota Kenari, 09000 Kulim and/or the petitioner's family houses or other house occupied by the petitioner and the children of the marriage;

(j) that the respondent is prohibited and restrained from making any form of personal contact with the petitioner and the children other than in the presence and/or plain view of an enforcement officer or such other person as may be specified by the court. The respondent shall only be allowed to make such personal contacts in places as may be specified by the court;

(k) that the two other properties bearing addresses of No 473, Jalan Kota Kenari 3, Taman Kota Kenari, 09000 Kulim, Kedah and No 127, Lorong Mahkota 8/1, Taman Seri Mahkota, 09000 Kulim, Kedah now held in joint names be sold within three months from the date of the order at market value to be determined by an independent valuer and the petitioner be ordered to hold the net proceeds of the sale on trust for the children of the marriage to fund their tertiary education;

(l) that in the event the respondent fails and/or refuses to execute the documents pertaining to the sale of the said properties described in para (k) aforementioned, within three months from the date of being required and ordered to do so; then the Penolong Kanan Pendaftar of the High Court at Penang be empowered to sign/execute the said documents on the respondent's behalf;

(m) that the respondent and/or the respondent's parents and agents are prohibited from dealing with the matrimonial jewelries (in the form of a long chain, necklace, a pair of earrings and wedding ring) given as gifts to the petitioner now kept in a bank safe and the petitioner is ordered to hold it on trust for the said children;

(n) that the police and enforcement officers are strictly ordered to assist the petitioner to execute the orders obtained if need be;

(o) that the respondent bear all costs of these proceeding; and

(p) that the petitioner be granted such further or other relief as the honorable court may deem fit and proper.

THE RESPONDENT'S SUBMISSION

[6] The respondent agreed with the petitioner that the marriage has broken down irretrievably. And it is the respondent's submission that in view of the admission by both parties that the marriage has indeed broken down irretrievably and as the petitioner was not claiming for the maintenance for herself pursuant to s 78 of the Law Reform (Marriage And Divorce) Act 1976 ('the LRA'), there is no real need or requirement for this honourable court to make a finding as to who or what caused the breakdown of the marriage;

(a) the respondent submits that from the evidence adduced in court and the testimony of both parties, the following conclusions are inevitable;

(b) the petitioner is not a credible witness as she is prone to exaggerations and misrepresentations;

(c) although the respondent may have had, at times reacted in frustration and unhappiness over the lack of family life and love that he came home to every few months, the incidents of alleged violence were not as

frequent or as serious as they were made out to be and the respondent is not a wife beater or child abuser as alleged by the petitioner;

(d) the petitioner did not really make a serious attempt to welcome the respondent or provide a happy home for the respondent whenever he came back home from Indonesia despite the fact that the respondent was home for hardly two weeks at a time and that too only three or four times a year. In fact the petitioner regularly frustrated the respondent's attempts to enjoy his very short periods home and his yearning to spend quality time with the petitioner and the children by deliberately taking the children away to stay with her parents for the major portion of his break. Any person in the respondent's shoes would have felt total frustration and misery if he/she were to repeatedly come home to an empty home or a hostile family despite working hard to provide well for them;

(e) the petitioner did not adduce sufficient evidence to prove that it was the respondent's acts of violence that caused her to take the children away to stay at her parents' house soon after his return to Malaysia each time. In fact, the petitioner had moved completely to her parents' house in 2013 and continued to live there with the children even during periods when the respondent was already back in Indonesia and was unlikely to return home for the next few months to give them misery as she claimed. This gives credence to the respondent's claim that the petitioner was more inclined towards spending time at her parents' house than at the matrimonial home;

(f) neither the petitioner nor the children appreciated the respondent's sacrifices by going to work in Indonesia in remote areas under difficult living conditions just so that he can earn a better income and provide well for the family's comforts. If the respondent had indeed lived in such comfort as the petitioner claimed he would not have suffered malaria three or four times during the course of his stint in Indonesia. Unfortunately for the respondent, his sacrifices backfired on him as he not only lost the petitioner and his children, the petitioner now wants to take everything that he owns or worked hard for without even making any just allowance or provision for what the respondent should be entitled to for his enormous contribution to the family income and assets;

(g) it is not surprising that the children do not feel any affection for the respondent as they have been systematically alienated from the respondent and the short bursts of anger or temper by the respondent or his strict attempts to discipline them have been magnified manifold by the petitioner and portrayed in a negative light to the children. It is clear that the petitioner deliberately alienated the respondent from the children as she always made it a point to complain to the respondent

about the children's lack of discipline or lack of progress in their studies and to prompt him to discipline them knowing fully well that he would scold them and react angrily to their poor results as he wanted them to do well in school. Of course, it is only natural that the children look upon the respondent in a negative light if every time he came home he found issue with their studies and scolded them;

(h) the respondent is not an alcoholic or a drunkard as he was made out to be as he would not have been able to find employment and stay employed (except for short periods between jobs) if he was an alcoholic or a drunkard. The respondent's brother (RW3) testified that he had never known the respondent to be an alcoholic or a drunkard. The petitioner attempted to show that the respondent was sacked in November 2013 from his job due to extreme alcoholism but the respondent denied that he was sacked and said that he had resigned due to disagreement with the management. We submit that the petitioner's testimony that she was informed by the respondent's general manager that the respondent was sacked is hearsay evidence and therefore ought to be rejected by this honourable court; and

(i) the petitioner had added to the discord between the parties by her unilateral action of arranging the adoption of a child, Jayshree for her brother, and when that failed, by registering the said child as the natural child of the petitioner and the respondent. Although the petitioner alleged that it was the respondent and not she herself who made the arrangements to take the child and register her under their names, the fact remains that the respondent was working in Indonesia and was not in a position to make such elaborate arrangements for the adoption of the child. It did not make sense for the respondent to have the child's birth registered a year later if the reason for the adoption was that he wanted a daughter. It also did not make sense for the petitioner to risk being involved in the illegal registration of the birth of the said child just because the respondent told her to do so if he had been the one who had arranged the said adoption as she could have easily forced him to attend personally for the said registration on one of his trips home. We therefore submit that it was an adoption that had been arranged by the petitioner for her brother and that she had been forced to register the child under her and the respondent's names a year later when her brother refused to take the said child.

[7] It is the respondent's submission that the petitioner is not the selfless, long suffering and helpless victim of domestic violence that she has made herself out to be and say that she had in fact contributed significantly to the breakdown of the marriage on account of the matters set out above and in the respondent's witness statement (WSD2).

[8] The respondent in response to the petitioner's claim seeks for the division of the matrimonial assets be divided as proposed by the respondent as follows:

(a) that the respondent be entitled to a much higher share in proportion to his contribution for the acquisition of the said property; and

(b) that the petitioner should not be entitled to more than 20% or 30% of the two shophouses.

[9] Further to the above properties, the respondent further claims for his entitlement to the petitioner's current residence, a semi-detached house with address No 20, Jalan Jelawat, Taman Maktab, Kulim, 09000 Kedah.

[10] The respondent has also offered that the petitioner be given one of the two shophouses whilst he takes the other one to use as business premises. As both have been paid for the petitioner will not have to worry about paying the housing loan installments.

[11] Furthermore given the fact that the petitioner has already drawn from her EPF savings and converted the remaining into a pension scheme it is the respondent's submission that it is only fair that the respondent be allowed to keep his EPF savings to meet the demands of his health.

[12] The respondent has conceded custody of the children of the marriage to the petitioner but the respondent seeks liberal access to the children whenever he is able to visit them in Malaysia (if he is working in Indonesia) or if he is working her then regular access and the right to take them back to stay with him for 1/2 of all school holidays each year. The respondent also prays for an order that he be given liberal telephone contact with the children so that he can call them often and check on their progress regularly due to the nature of his work.

[13] The respondent agreed to pay RM500 for each child of the marriage until they attained the age of 18 and for the eldest son even though he is already 18 and for the youngest child as well until she is 18 even though she was not adopted by choice.

[14] The respondent further seeks for the petitioner's other claims for arrears of maintenance as well as the other claims made in the petition and/or pursuant to the ex parte order of court dated 21 March 2014 be dismissed with costs as the petitioner failed to adduce proof of her said claims and further did not serve the said order of court on the respondent till today to entitle her to enforcement of the same.

FINDINGS OF THE COURT

[15] Having considered the submissions by both parties, it must first be noted that the respondent did not challenge the petitioner's claim for custody of the children and that the petitioner did not claim for maintenance for herself. Both parties also accepted the fact that the marriage had broken down irretrievably and that divorce is inevitable.

[16] Having regard to the above, the issues to be determined by this court are confined to the following:

(a) whether cause of breakdown of the marriage is of relevant consideration;

(b) whether the petitioner has the right to maintain the injunction order obtained by the petitioner against the respondent;

(c) whether the respondent is obliged to provide for the maintenance of the said children and to what extent;

(d) whether the first respondent should be given visitation rights to the said children born under this marriage and how should it be carried out; (it is to be noted that the respondent is no longer asserting his rights to custody, care and control of the said children); and

(e) how the division of the matrimonial assets should be carried out.

CAUSE OF BREAKDOWN

[17] It has been held that the degree of responsibility for the breakdown of the marriage has no application in a division of matrimonial assets under s 76 of the LRA unlike a wife's maintenance under s 78 of the LRA. This is illustrated in the case of *SS v HJK* [1991] MLJU 18; [1991] 1 LNS 99; [1992] AMR 145 where Mahadev Shankar J (as he then was) stated as follows:

> Indeed it should be noted that the regard a Malaysian Court is required to have to the degree of responsibility for the breakdown of marriage under section 78 of the Act does not occur in section 76 of the Act. In other words, this is a factor only in maintenance application and not in a division of matrimonial assets.

[18] Also in the case of *Lim Bee Cheng v Christopher Lee Joo Peng* [1997] 4 MLJ 35; [1996] 2 CLJ 697, it was held as follows:

> The power of the court to order division of matrimonial assets under s 76 of the LRA is subject and subject only to those considerations prescribed therein and that the conduct of parties is and has always been irrelevant.

[19] In this case before me both parties have admitted and agreed that the marriage has indeed broken down irretrievably and there was no claim by the

Petitioner for the maintenance for herself pursuant to s 78 of the Law Reform (Marriage And Divorce) Act 1976. I am therefore agreeable with the defendant's submission that there is no need for this court to make a finding as to the cause of the breakdown of the marriage in this case.

MATRIMONIAL ASSETS

Matrimonial home — No 354, Jalan Kota Kenari 4, Taman Kota Kenari, 09000, Kulim Kedah

[20] Section 76 of the LRA provides for the division of matrimonial assets upon a decree of divorce being granted. The factors the court should have regard to making the division are as follows:

76 Power for court to order division of matrimonial assets

(1) the Court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

(2) In Exercising the power conferred by subsection (1) the Court shall have regard to:

(a) the extent of the contributions made by each party in money, property or work towards acquiring the assets;

(b) any debts owing by either party which were contracted to their joint benefit;

(c) the needs of the minor children, if any, of the marriage and subject to those considerations, the Court shall incline towards equality division.

(3) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

(4) In exercising the power conferred by subsection (3) the court shall have regard to:

(a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;

(b) the needs of the minor children, if any, of the marriage; and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case the party by whose effort the assets were acquired shall receive a greater proportion.

(5) For the purposes of this section, reference to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.

[21] Reference is made to the case of *James Jemut Masing v Fiona Frances Masing Nee Henderson* [1994] MLJU 531; [1994] 2 CLJ 390, where Justice Chong Siew Fai set out the legal position as follows:

Law on Division of assets

For the division of properties acquired during the marriage, the law divides them into 2 categories:

(1) Assets acquired by the couple by their joint efforts;

(2) Assets acquired by the sole effort of one party to the marriage.

For category (1) ie assets acquired by joint efforts for the couple, the Court shall lean towards equality of division subject, however, to the following factors for consideration:

(a) The extent of the contributions made by each party in money, property or work towards the acquiring of assets;

(b) Any debts owing by either party which were contracted for their joint benefit;

(c) The needs of the minor children of the marriage

For category (2) ie assets acquired by the sole effort of one party to the marriage, the Court may divide the assets in such proportions as it thinks reasonable, regard to be had to the following considerations:

(a) The extent of the contributions made by the other party who did not acquire the assets, to the welfare of the family by looking after the home and caring for the family;

(b) The needs of the minor children of the marriage;

Provided, however, that in any case the party by whose efforts the assets were acquired shall receive a greater proportion.

The court may, instead of dividing the said assets, order the sale of such assets and the division of the proceeds of sale between the parties.

[22] Reference was also made to the case of *Baheerathy a/p Arumugam v V Gunaselan a/l V Visvanathan* [2012] 6 MLJ 868; [2013] 1 CLJ 954; [2012] 5 AMR 771, where Justice Yeoh Wee Siam stated as follows:

The guiding principle under s 76(2) of the LRA is for the court to incline towards equality of division of the matrimonial assets if both parties have acquired the assets by their joint efforts.

[23] It is noted that the matrimonial house was purchased for RM268,000 in joint names. The issue before this court is in regards to the withdrawal of RM19,294.17 from the petitioner's EPF contributed by the petitioner towards the purchase of the said matrimonial home whilst the respondent withdrew RM42,334.82 from his EPF for the same purpose. The balance of the purchase price was paid for by way of a government loan taken under the petitioner's name and a sum of RM1,193.76 being deducted from the petitioner's salary on a monthly basis.

[24] The respondent further claimed that he had reimbursed the petitioner for the monthly housing loan installments as the main portion of his monthly salary would be banked into his Maybank account every month and the petitioner was free to draw from his banking account to reimburse herself for the housing loan deductions as well as to pay for all household and family expenses and bills. The petitioner admitted that she had a free use of the funds in this account and that she paid for the household bills, expenses and housing loan instalments for the other two properties ie the two shophouses from this account. However, the petitioner insisted that she never took reimbursement for the housing loan instalments deducted from her salary each month although the respondent said that she was allowed to reimburse herself. The respondent further claimed that he had also paid for the renovations of the said matrimonial home.

[25] I refer to the case of *Wong Kim Foong (f) v Teau Ah Kau @ Chong Kwong Fatt* [1998] 1 MLJ 359; [1998] 1 CLJ 358, where Abdul Malik J (as he then was) observed as follows:

> ... on a true construction of s 76 of the Act, a spouse's contribution to the welfare of the family is a relevant consideration. The petitioner contributed a great amount to the welfare of the family. As such, both the houses were to be divided equally between the parties.

[26] In this case before me, the matrimonial home was acquired under the joint name of the petitioner and the respondent and both parties were the registered owners of the said matrimonial home each with 1/2 undivided share. The intention of the parties was clearly that the house was to be their matrimonial home where they would stay and raised their children. The loan was taken in the name of the petitioner and the petitioner was servicing the monthly loan installments by having her monthly salary deducted for the said purpose. However, the respondent's contribution towards the acquisition of the said matrimonial home and his financial contribution towards the maintenance of the matrimonial home and for the welfare of the family ought not to be overlooked.

[27] For reasons stated above, and having considered the needs of the

children pursuant to s 76(2)(c) of the LRA, it is in my considered view that it is just and fair to order that the said matrimonial home should be divided as follows:

(a) 40% share for the petitioner;

(b) 40% share for the respondent; and

(c) 20% share to be held by the petitioner on trust for the said children.

[28] I decided that since it is the intention of the petitioner to keep the property for her and the child to live in, the petitioner is to reimburse to the respondent the sum equivalent to the respondent's 40% share of the property in cash. A valuation report on the current market value of the property is to be conducted for the said purpose and the cost of the valuation report to be borne by both parties equally. As the said matrimonial house is currently under a government housing loan, the respondent's entitlement to the 40% share to be paid in cash by the petitioner is to be calculated on the net value of the property ie market value less the redemption sum and other incidental costs.

[29] Having also considered the fact that the petitioner is a government teacher and may not be able to pay the 40% share in a lump sum immediately, I therefore allowed the petitioner a period of 12 months, which is a reasonable period, to pay the respondent his 40% share of the property. Failure to do so within the stipulated time, the petitioner is required to sell the said matrimonial home and divide the net proceeds of the sale according to the allocation of shares stated above.

No 473, Jalan Kota Kenai 3, Taman Kota Kenari, 09000, Kulim Kedah (mortgage loans fully paid) ('shophouse 1') and No 127, Lorong Mahkota 8/1 Taman Seri Mahkota Kedah (mortgage loans fully paid) ('shophouse 2') (collectively referred to as 'the shophouses')

[30] In relation to the shophouses, I have considered the pleadings of both parties, the totality of all evidence adduced, and the written submissions filed. I further considered the following factors:

(a) the shophouses were acquired under the joint name of the petitioner and the respondent and both parties were the registered owners of the shophouses each with 1/2 undivided share;

(b) the respondent stated that the shophouses were placed in joint names to facilitate the collection of rentals and management of the properties;

(c) the installments were paid from the respondent's salary banked into the respondent's Maybank account which was at the petitioner's disposal;

(d) the petitioner does not claim to have paid any of the installments except for the period that the respondent's salary was no longer at the disposal of petitioner whereby the petitioner had paid for the installments in respect of the said shophouse 2 as the loan for the shophouse 1 had already been fully settled;

(e) the petitioner admitted that she had a free use of the funds in the respondent's account and that she had utilised the funds in the said account to pay for the household bills, expenses and housing loan instalments for the shophouses;

(f) the petitioner's main contribution towards the acquisition of the shophouses is in facilitating the collection of rentals and in the management of the said properties as admitted by the respondent, as well as to provide for the welfare of the family by looking after the home and caring for the family; and

(g) the respondent had offered that the petitioner be given one of the shophouses whilst he takes the other one to use as a business premise.

[31] Based on the contributions of both parties towards the acquisition of the above shophouses, and having considered the needs of the children, it is in my considered view just and fair to order as follows:

(a) *shophouse 1*:

the petitioner to transfer her 1/2 undivided share to the respondent and the respondent 1/2 undivided share shall be his to keep absolutely. The discharge and transfer shall be effected immediately from the date of this order; and

(b) *shophouse 2*:

the rspondent to transfer his 1/2 undivided share to the petitioner as trustee for the said children and the discharge and transfer shall be effected immediately from the date of this order. The other 1/2 undivided share shall be the petitioner's to keep absolutely. The said 1/2 undivided share shall be held in trust for the said children until they attained the age of 18 years old and in the case the petitioner intends to sell the said shophouse 2, the proceeds from the portion held in trust for the said children shall be set aside for the children's education and other needs.

[32] Each party to bear their own costs in the said discharge and transfer of shares since it is for the benefit of both parties.

EMPLOYEES' PROVIDENT FUND ('EPF')

[33] It is trite law that EPF contributions are matrimonial assets liable for division as clearly illustrated in the case of *Lim Kuen Kuen v Hiew Kim Fook & Anor* [1994] 2 MLJ 693; [1994] 3 CLJ 471 where Hishamuddin Yunos J (as he then was) makes the following decision:

> It is my view that *both the EPF and gratuity payments are matrimonial assets, that is to say, assets acquired during the marriage by the sole effort of one party to the marriage*. As for EPF payment, I am fortified in my view by the decision of Chan Sek Keong J in *Ong Chin Ngoh v Lam Chin Kian* [1992] 2 SLR 414 where at p 417 of the judgment it was held:
>
> > CPF (Central Provident Fund) contributions are compulsory. They are part of the wages or salaries of workers and employees. They constitute a valuable source of funds upon their retirement, whether for themselves alone or for themselves and their families. They are matrimonial assets if acquired during the marriage. If the CPF contributions were not deducted from the wages or salary of a worker, they would have gone to providing for himself and the family. They are assets acquired by the sole effort of the married worker during the marriage.
> >
> > The workers' rights in his CPF fund is not subject to normal legal process. The account holder himself may not draw it out until he has reached 55, except for certain prescribed purposes. He may not assign the benefit of it to anyone so long as it is not withdrawn. No creditor may attach it and even his bankruptcy will not vest the fund in the official assignee for distribution to his creditors. The CPF fund is inviolable, except to the extent set out in the Central Provident Fund Act (Cap 36, 1991 Ed). There is a moratorium on its integrity, until it is withdrawn.
> >
> > Notwithstanding these legal restrictions and disabilities, I cannot see why, for the purpose of determining the corpus of the matrimonial assets in divorce proceedings, the Court may not take into account the value of the CPF fund of each of the parties to the marriage. Of course, the Court will have no power to order any part of the fund to be paid to the wife, where the husband has no legal capacity to withdraw the fund. But, the legal capacity to use the fund has nothing to do with its legal nature as an asset of the marriage. The fact that the husband may nominate a person other than the wife to take the fund does not change its character. The husband has the same power to dispose of his other assets. It cannot be suggested that the disposing power of the husband makes such assets any less matrimonial assets if acquired during the subsistence of a marriage.

> The above decision was upheld by the Singapore Court of Appeal in *Lam Chih Kian v Ong Chin Ngoh* [1993] 2 SLR 253. At p 259 of its judgment the court held:
>
> > In our view the fact that the fund in a member's CPF (Central Provident Fund) account is subject to restrictions as to its use and disposal until he reaches the age of 55 and is inviolable except to the extent set out in the CPF Act does not make it any less of an asset. If the fund is accumulated during the marriage then it constitutes an asset acquired during the marriage and therefore within the ambit of s 106(3) (of the Women's Charter (Chapter 353)). On this, we agree with the

reasoning of Chan Sek Keong J set out in the passage quoted above.

> The scheme of the Singapore's Central Provident Fund (CPF), as governed by the [Singapore] Central Provident Fund Act (Chapter 36 1991 Ed), is almost similar to the scheme of our Employees Provident Fund (EPF) as governed by the Employees Provident Fund Act 1991. Section 106(3) of the [Singapore] Women's Charter (Chapter 353 Rev Ed 1985) is in pari materia with s 76(3) of the Law Reform (Marriage and Divorce) Act 1976. (Emphasis added.)

[34] In reference to the above cases, and in consideration of the respondent's health condition as well as the needs of the said children, I find it just and fair that 25% of the respondent's EPF monies be given by the respondent to the petitioner to be held on trust for the said children.

MAINTENANCE — CHILDREN

[35] In the case of *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109; [1997] 1 CLJ 375 Mahadev Shankar JCA had stated as follows:

> The parental duties in this context are spelt out by s 92 and it extends to accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

[36] In the case of *Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah* [2000] 6 MLJ 48; [2000] 3 CLJ 175, it was held as follows:

> Maintenance signify any form of material provision that will enable an adult to live a normal life and a child to be brought up properly. Thus maintenance cannot mean only mere subsistence, ie, the food she puts in her mouth but also means the clothes on her back, the house in which she lives and the money which she has to have in her pocket, all of which vary according to the means of the man who leaves a wife behind. Moreover, it is settled law that it is the duty of the father to maintain the standard of living the children had enjoyed in the past, ie, during the existence of the marriage.
>
> Pursuant to s 78 of the Law Reform (Marriage & Divorce) Act 1976 which states that the court 'shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage' when assessing maintenance.

[37] The power to award maintenance for children is provided under ss 92 and 93 of the LRA and read as follows:

> 92 Duty to maintain children
>
> Except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, either by

providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

93 Power for court to order maintenance for children

(1) The court may at any time order a man to pay maintenance for the benefit of his child:

(a) if he has refused or neglected reasonably to provide for the child;

(b) if he has deserted his wife and the child is in her charge;

(c) during the pendency of any matrimonial proceedings; or

(d) when making or subsequent to the making of an order placing the child in the custody of any other person.

(2) The court shall have the corresponding power to order a woman to pay or contribute towards the maintenance of her child where it is satisfied that having regard to her means it is reasonable so to order.

An order under subsection (1) or (2) may direct payment to the person having custody or care and control of the child or trustees for the child.

[38] Each parent has a duty to maintain a child. In this case the petitioner has been maintaining the said children without any contribution by the respondent since April 2014 when the petitioner moved out from the matrimonial home with the said children. The respondent stated that he is willing to give a monthly maintenance of RM500 for the said children until they attained the age of 18 years old.

[39] Reference is made to the case of *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109; [1997] 1 CLJ 375, where the Court of Appeal had to determine whether maintenance ordered for children ought to cease at attaining 18 years of age. The Court of Appeal dismissed the appeal saying in appropriate cases involuntary financial dependence constitutes a 'physical disability' under s 95 of the LRA. The children would be physically disabled to achieve their goals in life should the respondent fails to assist them in providing for their tertiary education.

[40] Based on the above principles and having considered the financial situations of both parties, and the evidence before me, I am satisfied that it is only fair for the respondent to bear the educational expenses of the children until the completion of their tertiary education notwithstanding they may have attained the age of 18. Therefore it is in my considered view that RM2,750 per month would be reasonable for the maintenance of the said children commencing from the date of this order until the completion of their tertiary education in the event the said children manage to pursue their tertiary education.

[41] In regards to arrears in maintenance, I hereby order that the respondent pay a maintenance of RM2,000 per month for the said children from the date of filing of this petition until the day before the date of this order.

CUSTODY AND ACCESS TO THE SAID CHILDREN

[42] The matter of custody of the child in this case is governed by s 88(1) and (2) of the LRA which provides as follows:

> 88 Power for court to make order for custody
>
> (1) The court may at any time by order place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person.
>
> (2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard:
>
> (a) to the wishes of the parents of the child; and
>
> (b) to the wishes of the child, where he or she is of an age to express an independent opinion.'

[43] The paramount consideration here is the welfare of the said children (see *Tay Chuen Siang v Wang, Chiao-Wen (f)* [2009] MLJU 260; [2009] 9 CLJ 84, *K Shanta Kumari v Vijayan* [1986] 2 MLJ 216; [1985] 1 LNS 135, *Ng Say Chuan (h) v Lim Szu Ling (w) and another application* [2010] 4 MLJ 796; [2010] 10 CLJ 371, and the Federal Court case of *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189).

[44] The respondent has conceded the custody of the said children. As such the care, control and custody of the said children shall be given to petitioner.

[45] However, disputes arose between parties in regards to access being given to respondent. The petitioner agreed that the respondent be given reasonable and/or supervised access not amounting to overnight access subject to the said children being interviewed by the learned judge. The petitioner further seeks for an order that the respondent be prohibited and restrained from making any form of personal contact with the petitioner and the children other than in the presence and/or plain view of an enforcement officer or such other person as may be specified by the court and that the respondent shall only be allowed to make such personal contacts in places as may be specified by the court.

[46] The respondent however seeks liberal access to the children whenever he is able to visit them in Malaysia (if he is working in Indonesia) or if he is

working in Malaysia then regular access and the right to take them back to stay with him for 1/2 of all school holidays each year. The respondent further prays for an order that he be given liberal telephone contact with the children so that he can call them often and check on their progress regularly due to the nature of his work.

[47] I have personally interviewed the said children namely:

(a) Jayhanraj a/l Jeeva — a son born on 19 September 1998, now aged 18 years ('the first child');

(b) Rajeev a/l Jeeva — a son born on 7 May 2001, now aged 15 years ('the second child');

(c) Jayavarman a/l Jeeva — a son born on 5 March 2008, now aged eight years ('the third child'); and

(d) Jayshree a/p Jeeva — a daughter born on 23 March 2009, now aged seven years ('the fourth child').

[48] I could see that there is a lot of anger and hatred in the said children against their father and these emotions were further witnessed in court when the first child testified in court against the respondent. The first child said that the respondent's act of violence towards his family and his alcohol habits were unforgivable. As a result of the respondent's conduct towards his family, the said children do not wish to see or have any contact with the said respondent. Throughout the interview as well as the trial process, the said children insisted on not meeting their father and wished that the court did not make an order for such purpose.

[49] The court's paramount consideration here is the welfare of the said children, and also the wishes of the parents and the said children. Although it appears to me that the petitioner and the said children were living happily without the respondent, the undeniable facts remains that the respondent is the father of the said children and he wants to be given reasonable access to the said children. To deny the respondent access completely would not be just since the respondent wants to meet the said children badly. It must be borne in mind that the respondent is also required to maintain the said children. However, I do not think that the respondent should be given frequent reasonable access as in most normal cases.

[50] In view of the past incidents and how it had impacted the said children which resulted in the children's refusal to meet the respondent, having regard also to the fact that the respondent is to maintain the said children until the completion of their tertiary education in the event they manage to pursue their

tertiary education, I am of the opinion that a supervised access is necessary. I therefore make the following order in regards to the said supervised access to the said children:

(a) when the respondent is back in Malaysia from his work in Indonesia and/or any other foreign countries, that the respondent be given supervised access on a Saturday for three hours; or

(b) if and when the respondent is working in Malaysia, that the respondent be given supervised access on alternate Saturdays for three hours.

[51] I further order that such access to be given to the respondent as stated above shall be further subject to the wishes of the said child following the principle in the case of *Leong Sam Moy v Low Chee Thiam* [1996] MLJU 640; [1997] 2 CLJ Supp 212, where it was held that access is the basic right of the child rather than that of the parents.

[52] It is now the responsibility of the petitioner, as the mother, to prepare the child mentally and emotionally, so that the said children will be more willing and comfortable to see their father. It is also the responsibility of the respondent to be patient and try his utmost to make up for the past misdeeds, and to win the said children's respect and trust, and ultimately the children's love. The respondent should not force access on the child if the child is not ready or willing yet.

CONCLUSION

[53] For the reasons stated above, I grant an order dissolving the marriage based on the divorce petition, the decree nisi is to be made absolute one month from the date herein.

[54] In regards to the matrimonial home, it is in my considered view that it is just and fair to order that the said matrimonial home should be divided as follows:

(a) 40% share for the petitioner;

(b) 40% share for the respondent; and

(c) 20% share to be held by the petitioner on trust for the said children.

[55] I also decided that since it is the intention of the petitioner to keep the property for her and the child to live in, the petitioner is required to reimburse to the respondent the sum equivalent to the respondent's 40% share of the property in cash. A valuation report on the current market value of the property is to be conducted for the said purpose and the cost of the valuation report to be borne by both parties equally. As the said matrimonial home is currently

under a government housing loan, the respondent's entitlement to the 40% share to be paid in cash by the petitioner is to be calculated on the net value of the property ie market value less the redemption sum and other incidental costs.

[56] Having also considered the fact that the petitioner is a government teacher and may not be able to pay the 40% share in a lump sum basis immediately, I therefore allow the petitioner a period of 12 months, which is a reasonable period, to pay the respondent his 40% share of the property. Failure to do so within the stipulated time, the petitioner is required to sell the said matrimonial home and divide the net proceeds of the sale according to the allocation of shares stated above.

[57] Based on the contributions of both parties towards the acquiring of the above two shophouses, and having considered the needs of the children, I hereby order as follows:

(a) *shophouse 1*:
the petitioner to transfer her 1/2 undivided share to the respondent and the respondent 1/2 undivided share shall be his to keep absolutely. The discharge and transfer shall be effected immediately from the date of this order;

(b) *shophouse 2*:
the respondent to transfer his 1/2 undivided share to the petitioner as trustee for the said children and the discharge and transfer shall be effected immediately from the date of this order. The other 1/2 undivided share shall be the petitioner's to keep absolutely. The said 1/2 undivided share of the respondent shall be held on trust for the said children until they attained the age of 18 years old and in the case the petitioner intends to sell the said shophouse 2, the proceeds from the portion held on trust for the said children shall be set aside for their educations and other needs;

(c) each party to bear their own costs in the said discharge and transfer of shares since it is for the benefit of both parties;

(d) in reference to the above cases, and in consideration of the respondent's health condition as well as the needs of the said children, I find it just and fair and order that 25% of the respondent's EPF monies be given by the respondent to the petitioner to be held on trust for the said children;

(e) for the maintenance of children, I order that the respondent pay the petitioner RM2,750 per month for the maintenance of the said children commencing from the date of this order until the completion of the children tertiary education. The said maintenance is to be banked into the petitioner's account by the respondent, the details of which is to be

provided by the petitioner to the respondent. The said maintenance is to be banked into her account by the seventh day of each month commencing from the date of this order;

(f) for the arrears of maintenance of the children, I order that the respondent to pay the petitioner RM2,000 (RM500 for each child) per month for the maintenance of the said children commencing from the date of the filing of this petition ie 15 August 2014 until the day before the date of this order. The said arrears of maintenance for the said children is to be paid by the respondent within six months from the date of this order and is to be banked into the petitioner's account, the details of which is to be provided by the petitioner to the respondent; and

(g) in regards to the access to the said children, I order that the respondent be given supervised access as follows:

(i) when the respondent is back in Malaysia from his work in Indonesia and/or any other foreign countries, that the respondent be given supervised access on a Saturday for three hours; or

(ii) if and when the respondent is working in Malaysia, that the respondent be given supervised access on alternate Saturdays for three hours.

[58] I further order that such access to be given to the respondent as stated above shall be further subject to the wishes of the said child following the principle in the case of *Leong Sam Moy v Low Chee Thiam* [1996] MLJU 640; [1997] 2 CLJ Supp 212, where it was held that access is the basic right of the child rather than that of the parents.

[59] Lastly it is ordered that each party bear their own costs.

Order accordingly.

Reported by Ashok Kumar